IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-896

Worthen Bank & Trust Company, N.A., ..... *Petitioner*

V.

National Bank Americard Incorporated ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF THE STATE OF ARKANSAS AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a district court, by grant of summary judgment, may hold per se illegal under Section 1 of the Sherman Act the membership and customer restrictions effected by National BankAmericard Incorporated's by-law 2.16.

## INTEREST OF THE STATE

The State of Arkansas does not express an opinion on the merits of this case. Rather, it simply urges the Court to grant certiorari and to rule on the question presented, because: (1) the particular issues involved are of importance to the financial institutions, businesses, and citizens of the State; (2) the case in its present posture has created considerable uncertainty as to the general applicability of per se rules to some types of economic arrangements, especially when "new" industries are involved; and (3) the Court of Appeals opinion appears to be inconsistent with controlling Supreme Court decisions. The State does not file this brief with the intention of promoting the private interests of either party to the litigation; its purpose is to assert a position which reflects the public interest of the State of Arkansas. Accordingly, it is appropriate for the Attorney General of the State to avail himself of the privilege, granted in Supreme Court Rule 42.4, of filing a brief amicus curiae.

In particular, the following concerns move the Attorney General to file this brief:

1. The State on occasion serves as a litigant parens patriae on behalf of its citizens in federal antitrust suits,[1] and in that capacity has an interest in the preservation of the unambiguous applicability of per se rules to certain types of economic arrangements, as presently required by a long line of Supreme Court cases, including at least two, *United States v. Topco Associates, Inc.*, 405 U.S. 596

1. On December 20, 1968, the State of Arkansas filed suit against certain drug companies on behalf of Arkansas consumers for violations of Section 1 of the Sherman Act. *State of Arkansas v. Chas. Pfizer & Co., Inc., et al.*, United States District Court, Eastern District of Arkansas, Western Division, Docket #LR 68 C-254. The settlement of the claims resulted in a distribution to Arkansas hospitals, infirmaries, sanitariums, nursing homes, rehabilitation centers and other institutions of $765,985.52 in December, 1973.

(1972) and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) in which per se rules were applied by the Court *after* a trial had been held at which the arrangements had been found permissible under the rule of reason.

2. Arkansas has an interest in seeing that there remains the opportunity for development and growth of bank credit card systems other than BankAmericard and Master Charge, whether national or wholly intrastate. The consumers and merchants and bankers, indeed, the public, simply cannot afford to see that growth delayed by years of trial and appeals. The bank card industry is broadly based now. The public impact of a lengthy delay will be even greater if it restricts the entry of thrift institutions and savings and loan associations into a field that has until recently been the private preserve of commercial banks.[2] The industry should be permitted to develop in free competition. The uncertainty generated by the Court of Appeals opinion will retard and inhibit the growth and development of the bank card industry. The consumer, in the final analysis, will bear the burden of the delay. He will be denied services that could otherwise be available to him, and he will be guaranteed the inefficiency that attends retarded development.

3. Arkansas is concerned that the case in its present posture may work to undermine the relatively certain guidelines which the per se rules offer to antitrust

2. The potential entry of thrift institutions into the credit card field gives the industry a new dimension. In September, 1973, the Board of Directors of NBI amended the by-laws to permit, for the first time, mutual savings banks to become members of the BankAmericard system. NBI By-law 2.01. In August, 1973, the Staff Report of the Domestic Finance Subcommittee of the House Banking and Currency Committee recommended broadening the powers of thrift institutions to allow savings and loan associations and credit unions to expand their services to include a wide variety of credit services, including consumer services. C.C.H. Federal Banking Law, ¶ 96, 056. Presumably this would include the power to issue credit cards.

enforcement authorities and to the State's businessmen, and perhaps to deny the very existence of a quick and ready remedy, summary judgment, to an aggrieved litigant who lacks the necessary resources to press his claim through a long and costly trial.

4. Arkansas, as a state which has begun only recently to industrialize, does not have a well-established body of case law interpreting its own antitrust statutes. Therefore, the Attorney General will naturally look to federal antitrust cases, especially those arising in the Eighth Circuit, for guidance in enforcing the Arkansas laws. Moreover, federal authorities, while not binding, will be highly persuasive to our state courts in their attempt to interpret fairly and apply the state statutes. Both the Attorney General and the courts will be aided in their efforts by the presence of a clear pattern of applicability of the per se rules.

5. The State has an interest in maximizing the ability of its citizens to obtain consumer credit when needed. The effect of the Court of Appeals opinion may be to thwart that interest by at least delaying or retarding the growth of bank card systems in Arkansas. This delay may restrict especially the ability of Arkansans to buy on credit outside the State in those areas where one bank card is more widely accepted than another; indeed, it may even discourage some people from exercising their fundamental right to travel to those areas.

6. By delaying the growth of bank card systems, the Court of Appeals opinion may diminish the ability of tourists with one bank card but without another type of bank card to buy on credit, or perhaps even to travel to

Arkansas, a state whose economy is heavily dependent on the tourist industry.[3]

The second and fifth considerations perhaps are more weighty in their application to Arkansas than to most other states for two reasons: Arkansas is still relatively underdeveloped economically, and it is the only state with a constitutional provision limiting to 10% per annum the interest rate on all transactions, including the sales of goods on credit.[4] See, generally, *Arkansas Consumer Credit Market Study*, 1968 Ill. Law Forum, 541; reprinted by the American Bar Foundation, Chicago, Ill.

In any state, the business of becoming an issuing member of a nationwide credit card system is somewhat risky.[5] In Arkansas the cost to banks of taking these risks is increased because the return on investment is not as great as elsewhere.[6] In other states, the typical interest rate limit on sales of goods on credit is 18%.[7] Accordingly, if the bank card industry is going to grow

3. *Tourism in Arkansas*, Ark. Dept. of Parks and Tourism (1972).

4. Ark. Const., Art. 19, Sec. 13, provides that "Contracts for a greater rate of interest than 10% per annum shall be void, as to principal and interest . . ." Upon cancellation of a contract for usury, a purchaser is entitled to retain possession of the subject of the sale. See, e.g. *Universal C.I.T. Credit Corporation v. Avery*, 225 Ark. 190, 280 S.W.2d 229 (1955); *Universal C.I.T. Credit Corporation v. Stanley*, 225 Ark. 96, 279 S.W.2d 556 (1955).

5. On the risks involved, see *Growth and Profitability of Credit Card Banking*, paper by Andrew F. Brimmer, member, Board of Governors of the Federal Reserve System, for 1971 National Credit Card Conference of the American Bankers Association.

6. In this respect it should be noted that individual card-issuing banks own the receivables generated by the use of cards that they issue. The individual bank makes the credit decisions and bears the losses or enjoys the profits of its card operation. NBI and Master Charge are paid annual fees based upon a member's volume of business.

7. There will be an additional demand for consumer credit from financial institutions in Arkansas as a result of the decision by Sears, Roebuck & Co. to discontinue promotions for all revolving charge credit accounts in Arkansas, effective January 15, 1974. Sears blamed the cut-back on increased costs and an "inadequate rate" for retail charge accounts in Arkansas. *Arkansas Gazette*, January 8, 1974, p. 2.

in Arkansas, the growth most likely will come from services offered by financial institutions located within the state.

## STATEMENT

The District Court for the Eastern District of Arkansas, 345 F. Supp. 1309 (Hon. John E. Miller) granted Worthen Bank & Trust Company's (Worthen) motion for partial summary judgment, holding that National BankAmericard Incorporated's (NBI) by-law 2.16 constitutes a per se violation of Section 1 of the Sherman Act. Specifically, the District Court held that: (1) NBI is a *horizontal* combination of competitors, on the authority of *United States v. Topco Associates, Inc.*, *supra*, and *United States v. Sealy, Inc.*, 388 U.S. 350 (1962); and (2) NBI's by-law 2.16 constitutes a group boycott, a per se violation of the Sherman Act, Section 1, on the authority of, *inter alia*, *Associated Press v. United States*, 326 U.S. 1 (1945).

The Court of Appeals for the Eighth Circuit, per Circuit Judge Ross, reversed and remanded for trial, holding that: (1) all horizontal membership restraints are not per se illegal, on the authority of the decree of the District Court in *Associated Press*, as approved by the Supreme Court; (2) it is improper to determine a case of first impression on a per se basis, on the authority of *White Motor Co. v. U.S.*, 372 U.S. 253 (1963); and (3) the horizontal restraint here in question presents a case of first impression because it is distinguishable from other categories of horizontal restraints which are per se illegal, and because the industry here involved is a relatively new and rapidly growing one about which too little is known to enable a proper evaluation of the effects of the by-law in question on competition.[8] *Worthen Bank & Trust*

8. In its Brief in Opposition, NBI characterizes the question presented as whether the Court of Appeals correctly reversed a summary judgment based on facts which are in conflict. The issue does not appear to be that simple. The facts in which the Court of Appeals expressed an interest are those touching upon competition between NBI and Master Charge and how the individual banks compete with each other. 485 F. 2d at 129. Further development of those facts became important to the Court of Appeals *only* after it concluded that summary judgment was inappropriate because the per se rules were not properly applied for the three reasons discussed above.

*Company v. National BankAmericard Incorporated*, 485 F. 2d 119 at 129-130 (8 Cir., 1973).

The United States, per Thomas Kauper, Assistant Attorney General, Antitrust Division, filed a brief amicus curiae in the Court of Appeals, arguing a position essentially identical to that ultimately reached by the Court of Appeals. As authority for the proposition that all collective restraints imposed upon individual members are not illegal per se, the Government cited, in addition to *Associated Press, inter alia, Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344 (1933), and *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918). (Government br., p. 20). Apparently, both the Court of Appeals and the Department of Justice agreed with Worthen and the District Court that NBI is a horizontal combination of competitors.[9]

The factual background of the case, with regard to the parties and to the particulars of the national bank credit card business in general, are well set out in the parties' briefs and in the opinions of the lower courts and need not be reiterated here.

9. In the Brief in Opposition to the Petition, NBI states that it is not a horizontal combination of competitors, but a unitary enterprise. The same can be said of the Associated Press when its member newspapers are engaged in interchanging news on a national basis as opposed to selling newspapers. NBI unquestionably is comprised of banks (485 F. 2d at 120), which are competitors, actual or potential. The Court of Appeals, quoting with approval from the amicus brief filed by the Department of Justice, stated the issue as follows:

> "The question on appeal is whether the district court correctly held that by-law 2.16 is illegal *per se* under Section 1 of the Sherman Act. More precisely the question is whether it is illegal *per se* for a group of banks which are combined in a system to produce a product (or service) that individually none of them is able to produce, but which they sell in competition with each other, to exclude from proprietary membership in their group a bank which is participating in another such system." 485 F. 2d at 126.

## ARGUMENT

### *I.*

***The Supreme Court should grant certiorari because the opinion of the Court of Appeals is in conflict with a clear line of Supreme Court decisions as to the per se illegality of horizontal restraints of trade. Even if the opinion of the Court of Appeals is affirmed, there should be a clear and definitive treatment by the Supreme Court of the important issues raised.*** [10]

A. The decree in *Associated Press* is questionable authority for the proposition that horizontal restraints or "bottlenecks" on membership in an association are not necessarily per se illegal as "boycotts." See, *e.g.*, *Neale, The Antitrust Laws of the United States*, pp 66 et seq. The opinion of Judge Hand for the District Court in *Associated Press*, 52 F. Supp. 362, clearly states the view, later accepted by the Supreme Court, that once membership in AP became open to all on reasonable terms, the other two challenged by-laws would not constitute boycotts, for there would be no denial of AP's dispatches, or of Canadian news by AP, except to those who voluntarily decided not to join AP and contribute to the mutual benefit of its members. 52 F. Supp. 362 at 370, 373-375.

On the other hand, the NBI by-law 2.16, standing alone, does constitute a group boycott of card issuing

10. In other cases where, as here, the decision of the Court of Appeals was not a final one, this Court has granted certiorari if the issue presented was, as it appears to be in this instance, fundamental to the further conduct of the case. *E.g., Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949); *Land v. Dollar*, 330 U.S. 731, 734 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944). The issue in the instant case is also fundamental to law enforcement, and the interests of justice and public policy will not be served by a delay in accepting or rejecting the reasoning of the Court of Appeals as to when the per se rules may be applied to certain trade combinations.

banks in Interbank Card Association (Master Charge) by NBI and a boycott of Master Charge agent banks by NBI insofar as they seek Class A membership in NBI. In addition, the by-law amounts to a horizontal customer restriction in that it prevents NBI Class A banks from enrolling Master Charge card issuers as NBI Class B banks.[11] Thus, NBI by-law 2.16 apparently violates the *principle* of *AP* that membership must be open to all on reasonable terms.

B. *White Motor Co.* is questionable authority for the proposition that a "new" horizontal restraint may not be declared per se illegal by summary judgment.

1. One of the grounds for the Court's reluctance to hold the restrictions in *White Motor* illegal was their *vertical* character, which rendered them inherently more defensible than horizontal restraints of like effect, which restraints were, and are, plainly illegal per se. This is made abundantly clear in the concurring opinion of Justice Brennan in *White Motor* 372 U.S. 253 at 264.

2. Only four years after *White Motor*, the Supreme Court held similar vertical territorial and customer restrictions illegal per se in *U.S. v. Arnold, Schwinn & Co., supra*, in spite of the fact that *there had been a trial* at which the District Court had "explicitly followed the directive of *White Motor* and examined in detail the historical and economic context in which Schwinn's distribution policies were developed and applied" and had found "that the ultimate effect of these policies was to enhance rather than undermine or destroy competition." (Stewart, J., dissenting at 386.) Justice Stewart pointed

11. The customer restriction effect of by-law 2.16 is not mentioned in NBI's Brief in Opposition to the Petition.

out that in *Schwinn* the Court was adopting a per se rule *in spite* of the fact that the Government, *as in this case*, had agreed the rule of reason should be applied. (Emphasis added.) Justice Stewart went on to say that the majority opinion in *Schwinn*

> " . . . completely repudiates the only case in point, *White Motor*. There the manufacturer sold its products to retailers and wholesalers and imposed territorial and customer restrictions on their resale, restrictions much more stringent than those involved here. But the Court in *White Motor* refused to apply a per se rule to invalidate these restrictions, and declared that their legality must be tested under the rule of reason by examining their actual impact in a particular competitive context. The Court today is unable to give any reasons why, only four years later, this precedent should be overruled. Surely, we have not in this short interim accumulated sufficient new experience or insight to justify embracing a rule automatically invalidating any vertical restraints in a distribution system based on sales to wholesalers and retailers."

Thus the decision in *Schwinn* seems to confirm the opinion of Justice Clark, dissenting in *White Motor:*

> "Neither time . . . nor all of the economic analysts, the statisticians, the experts in marketing, or for that matter the ingenuity of lawyers, can escape the unalterable fact that these contracts eliminate competition and under our case are void. The net effect of the remand is therefore but to extend for perhaps an additional five years White Motor's enjoyment of the fruits of its illegal action. *Certainly the decision has no precedential value in substantive antitrust law.*" (Emphasis added.)

C. The fact that the horizontal restraint here involved is not identical to those struck down as per se illegal in the leading cases is a questionable basis for refusal to apply a per se rule here.

1. The Court of Appeals divided the cases relied upon by *Worthen* into three categories: "group boycott" cases, *e.g.*, *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); "Territorial restrictions or price restraint" cases *e.g.*, *Topco*, *Sealy*; and membership restriction or "bottleneck" cases *Associated Press* and *U.S. v. Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800 (D. Kan), aff'd per curiam 355 U.S. 10 (1957), and found that the facts of *Worthen* did not place it within any of those categories. The Court of Appeals then reasoned that, since all horizontal restraints or "membership boycotts" are not per se illegal and since *White Motor* holds that application of a per se rule in summary judgment in a case of first impression is inappropriate, this case must go to trial.

This analysis of *Worthen* by the Court of Appeals is strikingly similar to that of Chief Justice Burger, in his lone dissent in *Topco*. There, the Chief Justice carefully distinguished the case at hand from the eight precedents relied upon by the majority and mentioned *White Motor* in emphasizing the importance of not making "a new per se rule . . . without regard to the impact which the condemned practices may have on competition." 405 U.S. 596 at 620.

In *Topco*, as in *Schwinn*, the Court applied the per se rule in spite of the fact that a full trial had been held, at which the restraints in question had been found permissible under the rule of reason, and notwithstanding

the careful distinctions drawn between *Topco* and the other precedential cases by Chief Justice Burger. Thus the Court's decision in *Topco* seems to reject the mode of analysis later adopted in *Worthen* and to give further evidence of the validity of Judge Hand's statement in *Associated Press*, with regard to then existing line of boycott cases: " . . . these settled instances are not exhaustive; they are only illustrations of a general doctrine whose scope they do not measure." 52 F. Supp. 362, 369.

2. The Court of Appeals recognized that the *Associated Press* and *Nationwide Trailer* cases were most nearly on point in the instant case.

*Associated Press* was distinguished on the ground that its illegal membership restriction was dissimilar to the NBI by-law challenged by Worthen. However, had AP had an analogous by-law, i.e., one prohibiting its members from joining UP or INS, it would clearly have been illegal. Even Justice Roberts, in his dissent in *Associated Press*, seems to have assumed that such a restriction on dual membership would have been illegal had it then been in force, for he quotes, in support of his own position, a letter of the Attorney General of March 12, 1915:

> " . . . it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association, *provided that no attempt is made to prevent the members from purchasing or otherwise obtaining news from rival agencies.*" 326 U.S. at 34, f.n. 6 (Emphasis added).

The Court of Appeals found the NBI by-law most similar to the AP by-law forbidding its members to sell news to non-members, which was not struck down by the Supreme Court. The problem with this analogy is that once membership in AP was open to all on reasonable terms (including members of UP and INS, as well as competitors of AP members), the 'no news to non-members' by-law no longer constituted a boycott or "bottleneck" at all. That is apparently why that particular AP by-law was not invalidated, even though it was part of the aggregate of trade restraints. On the other hand, the *Nationwide Trailer* provision, virtually identical to the by-law here in question, prevented its members from being connected with a competitive trailer system, and was, in and of itself, a boycott regardless of the accompanying price and territorial allocation agreement and accordingly was permanently enjoined. 156 F. Supp. 800, 807.

D. The possibility that by-law 2.16 may have pro-competitive effects is a questionable ground for asserting the inapplicability of a per se rule to a horizontal market restraint.

At least one of the majority in *Topco* agreed that the restraint then held per se illegal actually would have pro-competitive effects (Blackmun, J., concurring, 405 U.S. at 612-613). This defense has often been raised in Sherman Act cases *e.g.*, *U.S. v. Socony-Vacuum Oil Company, Inc.*, 310 U.S. 150 (1940); *Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271, aff'd. 175, U.S. 211 (1899); *Fashion Originators Guild v. F.T.C.*, 312 U.S. 452 (1941); *United States v. Sealy, supra.* The response of the Supreme Court has been consistent: it is for the government, not private enterprise, to determine what is

necessary to preserve a competitive economy, and if private restraints otherwise violative of our antitrust laws are necessary to that end, Congress must give them a specific exemption. *E.g., United States v. Socony-Vacuum Oil Company, Inc., supra; United States v. Topco Associates, Inc., supra.*

E. The distinction made by the Government in its amicus brief and accepted by the Court of Appeals, between the "product" produced by NBI and those produced by Topco and Sealy is insubstantial, and offers a questionable basis for the conclusion that by-law 2.16 may have no anti-competitive effects.

In its amicus brief, the Government stated that "The 'product' represented by a national credit card requires cooperative relationships among the member banks of a kind not encountered in the sale of products by individual supermarket chains." In other words, "neither Worthen nor any other Class A member of NBI is capable of producing a national bank credit card by itself" (Government Br., p. 19), whereas each of Topco's members could have produced the groceries there in question and each of Sealy's members could have produced the mattresses which bore the Sealy label.

There are at least two questions as to the significance of this distinction: First, assuming the distinction to be valid, in what manner does it operate to increase the reasonableness of by-law 2.16? The nexus between the distinction and the conclusion drawn is nowhere set out in either the Government's brief or the Court of Appeals opinion, and it is not self-evident.

Second, is the distinction really a valid one? Of course

each Sealy plant could produce its own mattresses, bearing its own name (not Sealy's). In fact, the plants did just that, at the same time they were producing the Sealy mattresses. The important fact, however, is that *only* by joining together could the manufacturers produce a mattress marketable nationwide and competitive with Simmons, the nation's largest manufacturer. Recognizing this fact, the members of the Sealy association, after the Supreme Court decision invalidating their practices, *merged* into one company in order to continue producing and marketing the Sealy products which, in terms of *economic significance*, were completely different from the mattresses which the members produced individually, although perhaps physically indistinguishable from them. This same line of reasoning applies with equal force to the products marketed by the Topco members. Conversely, Worthen could produce a credit card and market it in the City of Little Rock, and, to a lesser degree, throughout the State of Arkansas. Indeed, Worthen did just that for many years. However, by banding together with other banks and producing a credit card marketable nationally, Worthen, and other NBI members, like the Topco and Sealy associates, gain "certain economies which they could not otherwise achieve except by association." *Worthen v. NBI, supra* at 128, f.n. 7, referring to *Topco.*

*II.*

***The Supreme Court should grant certiorari in this case because of the uncertainty the Court of Appeals opinion injects into the heretofore clearly emerging pattern of per se rules under Section 1 of the Sherman Act.***

The advantages of the per se rules are thought to be so great that they have been applied to certain types of

arrangements even after a particular example of the type had been laboriously examined at trial and found to be within the rule of reason, as in *Schwinn* and *Topco*. Obviously the per se rules are not perfect instruments of judicial administration. They do not allow for the fine judgments which may be made after trial. However, as the Justice Department said in its amicus brief, they enable courts to decide cases without "prolonged and often fruitless economic inquiry." (Government Br., p. 13) Moreover, without the per se rules, businessmen and officials charged with antitrust enforcement responsibility would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.

## CONCLUSION

For the foregoing reasons, the State of Arkansas urges the Court to grant the petition for writ of certiorari in the within case.

Respectfully submitted,

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